

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

MARCIA D. PEOPLES

Claimant

VS.

WAL-MART

Respondent

AND

AMERICAN HOME ASSURANCE CO.

Insurance Carrier

Docket No. 1,000,427

ORDER

The respondent¹ requested review of the August 14, 2003 Award² by Administrative Law Judge (ALJ) Nelsonna Potts Barnes. The Appeals Board (Board) placed the matter on the summary docket and the case was deemed submitted as of October 21, 2003.

APPEARANCES

James B. Zongker of Wichita, Kansas, appeared for the claimant. Kurt W. Ratzlaff of Wichita, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

¹ Claimant initiated this appeal by filing an Application for Review on August 19, 2003. Thereafter, the claimant sought to dismiss her appeal. However, respondent objected. Thus, respondent is deemed to be appellant for purposes of this appeal.

² The ALJ executed a Nunc Pro Tunc Order correcting a computational error in the original Award. The date of this subsequent Order is unknown, but it was filed on Aug. 25, 2003.

ISSUES

The ALJ found claimant sustained a 15 percent permanent partial impairment to her right lower extremity (ankle) as a result of an injury that occurred on February 10, 2001. The ALJ also found a 5.7 percent net permanent impairment to the cervical spine for an injury that occurred on November 16, 2001. In making this finding, the ALJ specifically took into consideration the physicians' opinions regarding the pre-existing impairment to her cervical spine.

The respondent and its carrier request review of this decision, arguing that claimant failed to sustain her burden of proof with regard to the permanent impairment resulting from the February 10, 2001 ankle fracture. Respondent contends claimant's broken ankle "had healed completely at the time she was released from medical treatment" as evidenced by the x-rays.³ Thus, she was entitled to no permanency.

Claimant argues that Dr. Murati's opinions properly incorporated the principles set forth in the *Guides*, 4th Edition.⁴ As such, she is entitled to the 15 percent to the lower extremity he assigned and which was adopted by the ALJ as it was the only opinion contained within the record.

Claimant also asserts that the ALJ should have disregarded the pre-existing percentage assessed by Dr. Eyster because he did not see her before the occurrence of the accidents at issue in this claim. She argues that her permanent impairment following the November 16, 2001 accident was a full ten percent rather than the lower net percentages assessed by either of the above-referenced physicians.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant sustained two separate compensable accidents while in respondent's employ. The first occurred on February 10, 2001 when she fell and broke her right ankle. She was immediately seen at a local emergency room and then referred to Dr. Dobyns who diagnosed an undisplaced fracture of the lateral malleolus. She was placed in a CAM walker and released to return to work with restrictions. Claimant was thereafter released from treatment on July 25, 2001.

³ Respondent's Brief at 2 (filed Oct. 9, 2003).

⁴ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment*, (4th ed.).

Claimant continues to experience pain and swelling in her ankle when she stands for long periods of time and she also has difficulties when the weather changes. During the regular hearing she was able to demonstrate a popping or grating sound when she moved her ankle.

On November 16, 2001 claimant was again injured when she slipped and fell, hitting her head on a pop machine while at work. She injured her neck in this accident and was again referred to Dr. Dobyns who diagnosed cervical sprain. Claimant received conservative care but continues to complain of pain at the base of her neck and down her left shoulder and arm. She experiences pain when working overhead, lifting or bending. Claimant continues to work for respondent and although she works five hours less per week, her hourly rate of pay has increased and therefore, she is earning 90 percent or more than her pre-injury wage.

Respondent directed claimant to be seen by Dr. Robert Eyster, a board-certified orthopaedist when her neck complaints did not resolve over time. Dr. Eyster saw claimant first on February 7, 2002. According to his testimony, Dr. Eyster's examination was not limited to any particular area of body. Rather, he was simply directed to see her for purposes of evaluation and treatment. His written report, although inartfully expressed, seems to contradict this fact. He states "I did not see her for any other injury or complaints or problems in regards to the work injury of 11/16/01." ⁵ Contrary to Dr. Eyster's contention, his own statement seems to suggest that his examination was intended to focus solely on the cervical injury that occurred on November 16, 2001.

Dr. Eyster's records indicate claimant's chief complaint stemmed from the pain in her neck and upper thoracic region as a result of the November 16, 2001 accident. His office note and subsequent report do not reflect any complaints with regard to her ankle. Indeed, he never looked at nor treated her lower extremity.⁶ Respondent maintains that Dr. Eyster had every opportunity to examine whatever complaints claimant might have had in connection with either of her work-related injuries, including the ankle, and that her only complaints to Dr. Eyster dealt with her neck and upper back.

Dr. Eyster diagnosed degenerative disc disease in the C5-6 region of her neck. Following a period of treatment, including injections and physical therapy, he found her to be at maximum medical improvement and assessed a seven percent permanent impairment to her neck using the *Guides*. During his deposition, Dr. Eyster was asked whether any of this seven percent pre-existed the November 16, 2001 accident. In response, he opined that "I felt that 80 percent preexisted; 20 percent of the

⁵ Eyster Depo. Ex.1.

⁶ Eyster Depo. at 8.

symptomatology that she was having was a result of the work injury itself."⁷ The net result of his opinion is that claimant sustained a 1.4 percent permanent impairment associated with the November 16, 2001 accident.

At the request of her counsel, claimant was evaluated by Dr. Pedro A. Murati. Dr. Murati saw claimant on October 9, 2002, and at that time her complaints included occasional spasms in the neck and occasional numbness and tingling. She also complained of occasional headaches and low back pain.

Following his examination, Dr. Murati identified a decreased sensation along the saphenous and peroneal distribution on her right leg which, according to him, is significant for a peripheral neuropathy of the nerves. He also found her to have crepitus or a grinding sensation in her ankle. Based upon these findings, he assigned a 15 percent to the right lower extremity at the level of the ankle. According to Dr. Murati, this 15 percent was derived based upon Table 62 on Page 93 of the *Guides*.

This was not the first time claimant had been seen by Dr. Murati. In 1996 or 1997, claimant sustained an injury to her neck when a busy door unexpectedly closed on her. Immediately following that accident she received physical therapy and was then released from care. He diagnosed claimant with cervical strain, myofascial pain syndrome affecting the neck and bilateral shoulders. At that point, claimant had no evidence of any radiculopathy. Dr. Murati treated her until September 8, 1997, at which time he released her and assigned a three percent whole body impairment as a result of the accident. According to claimant, she's had no restrictions imposed upon her as a result of that accident nor did that accident prevent her from performing any of her work duties.

After considering the evidence offered by the parties and the arguments offered in support of their respective positions, the Board finds the ALJ's opinions to be well-reasoned and affirms. It is disingenuous to argue that Dr. Eyster was authorized to consider and evaluate any complaints claimant might have expressed during his examination. While Dr. Eyster may have testified that he was not limited in his scope, his own report indicates that he was retained to examine solely for purposes of the November 16, 2001 accident and nothing more. Claimant had been treated by another physician for her ankle injury and been released. There is no reason for her to have expressed any complaints to this physician, particularly if his questioning was focused on her neck problems. Thus, the fact that claimant did not express any ankle problems to Dr. Eyster, the physician who was evaluating her neck complaints, is not problematic.

It is, likewise, disingenuous to argue that Dr. Murati's opinions are unsupported because he failed to utilize joint interval spacing as a basis for his impairment and instead extrapolated a rating based upon the principles set forth in the *Guides*. While Dr. Murati

⁷ Eyster Depo. at 6-7.

did not apparently use the joint interval spacing in his evaluation, he nonetheless consulted the *Guides* and utilized the principles in coming to his impairment opinion. That, coupled with claimant's own testimony regarding her ongoing complaints of pain in her ankle along with the swelling and arthritic complaints, the 15 percent found by the ALJ is reasonable.

As for the neck impairment, neither party seriously disputes the 5.7 percent assessment made by the ALJ. Claimant clearly had preexisting symptoms in her neck as a result of a prior accident and was even rated . Thus, both physicians deducted that amount each felt preexisted the claimant's November 16, 2001 accident. When those two net impairments were averaged, the result was the 5.7 percent assessed by the ALJ. The Board hereby affirms the 5.7 percent found by the ALJ

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Nelsonna Potts Barnes dated August 14, 2003, is affirmed in all respects.

IT IS SO ORDERED.

Dated this _____ day of November, 2003.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: James B. Zongker, Attorney for Claimant
Kurt W. Ratzlaff, Attorney for Respondent and American Home Assurance Co.
Nelsonna Potts Barnes, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director